INDEX.

CASES CITED.

CONSTITUTION, STATUTES, OPINIONS, REPORTS, &c., CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 320.

NATIONAL PAPER AND TYPE CO.,
Plaintiff-in-Error,

vs.

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The questions involved come to this Court upon a writ of error to the District Court of the United States for the Southern District of New York. The plaintiff in error is a New Jersey corporation which has its prin-

cipal place of business in the city of New York, in the State of New York, in the United States, and during all the times stated in the complaint was and still is engaged within the United States in the business of exporting with capital invested in said business, that is to say, the purchase of personal property within the United States by said plaintiff in error, and the exportation and sale of said personal property without the United States by said plaintiff in error.

In such business of exporting, the said plaintiff in error was, and is, necessarily subject to the competition of corporations organized, authorized or existing under the laws of foreign countries, and under the laws of Porto Rico and the Philippine Islands, which by the terms of the Revenue Act of 1921 hereinafter mentioned were denominated foreign countries (not included in the term 'United States') and whose corporations were classified as foreign corporations; which said foreign corporations at all times stated in the complaint, and before and since, were and are, similarly engaged within the United States in the like business of exporting, that is to say, the purchase of personal property within the United States by such foreign corporations and the exportation and sale of such personal property without the United States by such foreign corporations. And, as stated in the complaint, such foreign corporations have invested under the protection of the United States large amounts of capital within the United States in such business of exporting, which business of exporting was and is transacted by

said foreign corporations under the same or like circumstances and conditions and in the same or like manner as the said plaintiff in error transacted the said like business of exporting.

The cause of action stated in the complaint relates to the assessment and collection from the plaintiff in error of the income tax imposed with respect to the last one-fourth part of plaintiff in error's fiscal year ended March 31, 1921, that is, for the quarterly or three-months period of said fiscal year consisting of the months of January, February and March in the year 1921, under the provisions of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921 (42 Stat. at L. Chap. 136, Sections 205 and 230, pp. 227 *et seq.*). In all of the said fiscal year, the plaintiff in error's business consisted entirely of exporting, as stated above, and its net income or profits for said fiscal year accrued or were derived from said business of exporting so carried on.

The plaintiff in error was notified by the defendant in error that, upon the basis of the return which had been filed by the plaintiff in error for its said fiscal year, as required by law, it was assessed and compelled to pay to the defendant in error the sum of $16,796.31, as and for the tax imposed by the said Act of Congress together with the Act of Congress approved February 24, 1919, known as the Revenue Act of 1918 (40 Stat. at L. Chap. 18, Sections 230 and 301, pp. 1057 *et seq.*), upon all of the net income or profits of its said fiscal year, and that payment must be made of said sum in

quarterly payments beginning on or before June 15, 1921, unless paid in full on or before that date, said notice being the usual notice under the Income Tax Law. The plaintiff in error thereupon paid to the defendant in error the said amount of said assessment in four quarterly payments, of which $4,203.91 paid on March 15, 1922 is the payment to which said cause of action relates; and said plaintiff in error accompanied said payment with a written protest that the said amount of tax was illegally assessed and collected, in violation of the provisions of the Constitution of the United States. The first three of said quarterly payments were governed by said Revenue Act of 1918, and the last or fourth of said payments, to which said cause of action relates, was governed by said Revenue Act of 1921. Thereafter, on or about December 6, 1922, the plaintiff in error made to the Commissioner of Internal Revenue a claim for refund of the taxes so paid under protest, as aforesaid, on the ground that said taxes were illegally assessed and collected, inasmuch as the taxes were assessed and collected in violation of the provisions of the Constitution of the United States.

On February 19, 1924, more than six months after the filing of said claim for refund, as provided by Section 1318 of said Revenue Act of 1921, the plaintiff in error sued the defendant in error in the District Court for the recovery of the amount of $3,999.08 of said payment of tax on March 15, 1922, on the ground that the assessment and collection of said amount were in violation of the Fifth Amendment of the Constitution of the

United States, and in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States (Amended complaint appears in the Record, pp. 2-5). The defendant in error moved to dismiss the amended complaint as not stating facts sufficient to constitute a cause of action, and demanded judgment dismissing the amended complaint (Record, p. 5).

The motion to dismiss the amended complaint was granted by the District Court on the authority of National Paper & Type Company *v.* Edwards, 292 Fed. 633. The opinion of the District Court in that case appears in the Record at pages 6 to 8.

Assignment of Errors.

The errors assigned are:

FIRST: That the Court erred in holding that the amended complaint did not state facts sufficient to constitute a cause of action; and in granting the Defendant's motion for judgment on the pleadings.

SECOND: That the Court erred in holding that the Congress of the United States may arbitrarily tax the net income or profits of the Plaintiff accruing or derived from the business of purchasing and exporting personal property from the United States for sale without the United States by the Plaintiff when the like net income or profits of foreign corporations, accruing or derived from the like business of exporting transacted by said foreign corporations within the United States under the

protection of the United States with capital invested within the United States in said business by said foreign corporations, is wholly exempted from like taxation by the Congress of the United States.

THIRD: That the Court erred in holding that the alleged tax imposed by the Congress of the United States on the net income or profits of the Plaintiff accruing or derived from the business of exporting personal property purchased by the Plaintiff within the United States for sale without the United States by the Plaintiff was not the confiscation or taking of Plaintiff's property in violation of the Constitution of the United States when the like net income or profits of foreign corporations accruing or derived from the like business of exporting transacted within the United States by said foreign corporations with capital invested within the United States by said foreign corporations, under the same or like circumstances and conditions and in the same or like manner as the Plaintiff transacted the said like business of exporting, was wholly exempted from like taxation by the Congress of the United States.

FOURTH: That the Court erred in holding that the tax imposed by the Congress of the United States upon the net income or profits of the Plaintiff accruing or derived from the business of exporting transacted within the United States by the Plaintiff did not impede and discourage the Plaintiff's said business of exporting and thereby impose upon said business of exporting a

direct and immediate burden in violation of the Constitution of the United States when the like net income or profits of foreign corporations accruing or derived from the said like business of exporting transacted within the United States by said foreign corporations with capital invested in said like business within the United States by said foreign corporations was wholly exempted by the Congress of the United States from like taxation.

The foregoing assignments of error amount substantially to the single contention that the lower court should have denied the motion to dismiss the amended complaint and should have made an order to that effect.

Contention of Plaintiff in Error.

The alleged tax, imposed upon the net income of the plaintiff in error accruing from its business of exporting, for the recovery of which this action was brought, was, with respect to the entire exemption therefrom of the like net income accruing likewise to foreign corporations transacting the like business of exporting within the United States with capital invested in the United States, a hostile discrimination and confiscation of property forbidden by the "due process of law" provision of the Fifth Amendment of the Constitution of the United States; and was also a burden on and impediment to the exporting business of the plaintiff in error in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States.

Outline of Argument.

First.

The assessment and collection of the alleged tax on the plaintiff in error's net income or profits accruing or derived from its business of exporting transacted within the United States with capital invested within the United States was not the exertion of taxation but the confiscation or taking of plaintiff in error's property in violation of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be "deprived of life, liberty or property without due process of law", inasmuch as under the provisions of the law imposing said alleged tax upon the plaintiff in error, corporations organized under the laws of foreign countries were wholly or entirely exempted from the payment of like tax on like net income or profits accruing or derived from the like business of exporting transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which like business of exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the same or like manner as said plaintiff in error transacted the said like business of exporting within the United States, that is to say, the purchase of personal property within the United States and the exportation and sale of such personal property without the United States.

Second.

The alleged taxation imposed upon the said net income or profits of the plaintiff in error's said business of exporting transacted in the United States with capital invested in the United States by the plaintiff in error, constituted a direct burden on and impediment to the plaintiff in error's said business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State", inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of exporting transacted in the United States with capital invested in the United States by said foreign corporations was wholly exempted under the same law from like taxation.

ARGUMENT.

FIRST.

The assessment and collection of the alleged tax on the plaintiff in error's net income or profits accruing or derived from its business of exporting transacted within the United States with capital invested within the United States was not the exertion of taxation but the confiscation or taking of plaintiff in error's property in violation of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be "deprived of life, liberty or property without due process of law", inasmuch as under the provisions of the law imposing said alleged tax upon the plaintiff in error, corporations organized under the laws of foreign countries were wholly or entirely exempted from the payment of like tax on like net income or profits accruing or derived from the like business of exporting transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which like business of exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the same or like manner as said plaintiff in error transacted the said like business of exporting within the United States, that is to say, the purchase of personal property within the United States and the exportation and sale of such personal property without the United States.

The Law in the Case.

The law under which the defendant in error claimed to act in assessing and collecting the said alleged tax

from the plaintiff in error (Sections 230 and 205(*a*) of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921, 42 Stat. at L., Chap. 136) is in its pertinent parts as follows:

> "Sec. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:
>
> (*a*) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and
>
> (*b*) For each calendar year thereafter, 12½ per centum of such excess amount.
>
> Sec. 205. (*a*) That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period."

The provisions of this law which grant to foreign corporations engaged in the business of exporting in the United States exemption from the said alleged tax imposed upon the plaintiff in error, which exemption is

set forth in the amended complaint (Record, p. 3), are as follows:

> "Sec. 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (*b*) of section 212 or in section 226. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the computation shall also be made in the manner provided in section 217.
>
> "Sec. 233 (*b*) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by section 243 or 246) in the manner provided in section 217.
>
> "Sec. 217 (*e*) Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (*a*) and (*c*), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary * * * Gains, profits and income from (1) transportation or other services rendered partly within and partly without the United States, or (2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits

and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold."

The exemption thus given in the Revenue Act of 1921 to foreign corporations engaged in the business of exporting in the United States from the tax imposed by that Act on the like income of American corporations engaged in like business was a continuation of the like exemption given to the foreign corporations by the preceding Act of Congress, approved February 24, 1919, known as the Revenue Act of 1918 (40 Stat. at L. Chap. 18); but was a change in this respect from the former income-tax laws of 1894, 1909 (Corporation Tax Law), and 1913, all of which taxed such income of the foreign corporations likewise and equally with like income of the American corporations.

The corresponding provisions of the Revenue Act of 1918 imposing taxes, and granting exemption to foreign corporations, are as follows:

"Section 230. (*a*) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and

(2) For each calendar year thereafter, 10 per centum of such excess amount."

* * * * *

"Section 301 (*a*) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket.

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital:

Third Bracket.

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(*b*) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (*c*) of this section) a tax equal to the sum of the following:

First Bracket.

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket.

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital."

* * * * *

"Sec. 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (*b*) of section 212 or in section 226.

"Section 233. (*a*) That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in section 213, except that:

* * * * *

(*b*) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States."

Like and Equal Treatment under Prior Income Tax Laws.

All the income-tax laws of the United States enacted during the years prior to the European War, and following the Act of 1866, provided that the tax, at the same rate as for domestic corporations, should be imposed upon foreign corporations with respect to income accruing from "business transacted and capital invested within the United States"; and under such provisions such foreign corporations were obliged to make return of, and pay the tax upon, their income derived from the purchase or production of personal property in the United States and the exportation and sale of such property in foreign countries.

The provisions of our laws of 1894, 1909 and 1913, under which like and equal taxation was imposed upon the foreign corporations, were as follows:

In the Act of August 27, 1894 (28 Stat. at L., Chap. 349, pp. 553, 555):

> "Sec. 31. Any nonresident may receive the benefit of the exemptions heretofore provided for by filing with the deputy collector of any district a true list of all his property and sources of income in the United States and complying with the provisions of section twenty-nine of this act as if a resident. In computing income he shall include all income from every source, but unless he be a citizen of the United States he shall pay only on that part of the income which is derived from any source in the United States. In case such nonresident fails to file such statement, the collector of each district shall collect the tax on the income derived from

property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such nonresident shall be liable to distraint for tax; Provided, that nonresident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against nonresident persons.

Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, savings institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies or associations doing business for profit in the United States no matter how created and organized, but not including partnerships."

In the Act of August 5, 1909 (36 Stat. at L., Chap. 6, pp. 112, 113):

"Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any

State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends, upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

In the Act of October 3, 1913 (38 Stat. at L., Chap. 16, p. 172):

"G. (*a*) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-

stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year."

Foreign Corporations Carrying on Exporting Business in the United States.

It is well known and officially admitted that foreign corporations are, and were, engaged within the United States in the business of exporting, and that such foreign corporations have invested under the protection of the United States large amounts of capital in such business of exporting; and that under the said Revenue Act of 1921 such foreign corporations were wholly exempted from the payment of tax on the net income or profits derived therefrom. The plaintiff in error during the time said Revenue Act of 1921 remained in effect necessarily competed with such foreign corporations in transacting the like business of exporting within the United States and, as stated in the complaint, such business of exporting was transacted by such foreign corporations under the same or like circumstances and conditions, and in the same or like manner, as the plaintiff in error transacted the like business of exporting within the United States. That is to say, the plaintiff in error and such foreign corporations purchased personal property from manufacturers or merchants within the

United States; paid for such personal property with capital invested within the United States; had such personal property delivered to them within the United States; negotiated the contracts for the transportation of such personal property from the United States to foreign countries; sold such personal property to buyers in foreign countries through agents employed for that purpose; and received within the United States the net income or profit derived from said business. The discrimination against the plaintiff in error was therefore made to depend upon difference in nationality or allegiance of the corporations with which it competed in such business of exporting within the United States.

In a country of great natural resources like the United States, with a stable and enlightened Government guaranteeing security for life, liberty and property, it was natural and inevitable that a very large foreign trade would follow the development of such resources, and that foreign commercial interests, attracted by this great opportunity, would invest their capital in the United States and compete with American citizens and corporations in supplying the demand of foreign countries for American products. Under our Constitution and laws, and in accordance with rights guaranteed by treaties negotiated by the United States with practically all the commercial nations of the world, the citizens and corporations of these foreign countries have been freely admitted into the United States and allowed to engage in any lawful business or occupation on the same terms and conditions as American citizens

and corporations, and hence they enjoy, under the protection of the United States, all the commercial rights and privileges conferred by our national and state constitutions and laws equally with our own citizens and corporations.

If the Revenue Act of 1921 had imposed tax on the income of these foreign corporations transacting the business of exporting within the United States, deductions from gross income under that Act would have included the commissions or salaries paid to their agents in foreign countries for effecting the sale of the exported property in the foreign countries, as well as the taxes paid by such agents for account of such foreign corporations, and hence all of the net income received by them within the United States was earned by such foreign corporations under the protection of the United States from business transacted and capital invested within the United States.

That this exemption from tax was not granted by Congress for the relief of foreign corporations in foreign countries importing personal property from the United States pursuant to contracts of purchase negotiated by the agents of such corporations in the United States, is well known. Such foreign importing corporations frequently employ such agents in the United States to negotiate such contracts of purchase with American merchants. These agents may be aliens or citizens of the United States. If aliens they were required, like American citizens, to pay tax under the Revenue Act of 1921 on their

net income derived from their personal services. After such contracts are negotiated, it is the practice for such American merchants selling the goods to export the property on designated vessels or lines for delivery to the foreign importing corporations in the foreign countries. Payment for property so exported is customarily obtained by such merchants through bills of exchange drawn on the foreign importing corporations through banks or other financial agencies in the United States, and, until such bills of exchange are paid or accepted by, and the bills of lading under which the property was exported from the United States delivered to, such corporations in the foreign countries, the title to the property remains with the American merchants. It is therefore manifest that such sales by American merchants to foreign importing corporations in foreign countries, arising from contracts of purchase negotiated by such agents in the United States, are not completed until after arrival of the property in the foreign country. Under such circumstances no capital is invested within the United States by such foreign importing corporations, and since the export commerce within the United States is wholly transacted by such American merchants it is clear that the net income derived from the resale of such property in foreign countries by such foreign importing corporations there is beyond the jurisdiction of the United States. If, after such foreign corporations have had such property delivered to them in the foreign country, they should export from there and sell such property through agents in

other foreign countries, receiving payment for such sales in their own country, the status of such foreign corporations in such foreign country would correspond to that of foreign corporations residing in the United States and transacting the like business of exporting within the United States, under the protection of the United States, with capital invested in such business by such corporations within the United States.

With reference to the activities of both foreign and domestic corporations in connection with the business of purchasing personal property within and selling such property without the United States, it is well known that such activities include the maintenance of offices in the United States fully equipped to carry on the business of exporting; the erection or leasing of warehouses, elevators, etc., for the storage, repacking, and grading of personal property purchased to supply the demand of foreign countries; the leasing of agricultural, timber and mineral lands, the products of which they sell in foreign countries; and the leasing of wharves or docks for use by the vessels which they charter in the United States for the transportation of such personal property to foreign countries.

The Attorney General's Opinion on the Like Exemption of Foreign Corporations under the Revenue Act of 1918.

On November 3, 1920, the Attorney General of the United States sent to the Secretary of the Treasury an opinion which construed Section 233 (*b*) of the Revenue Act of 1918 (see page 15, *supra*). This opinion

(32 Op. Atty. Genl. 336), was promulgated by the Secretary of the Treasury for the information and guidance of the collectors of internal revenue and others concerned, and its pertinent parts, which governed the application of the tax in the case of the plaintiff in error, under Sections 217 and 233 of the Revenue Act of 1921, are as follows:

"DEPARTMENT OF JUSTICE,
WASHINGTON, November 3, 1920.

SIR:

I have the honor to acknowledge receipt of your letter of August 12, 1920, requesting an opinion as to whether, under the Revenue Act of February 24, 1919, in the five following cases, the foreign corporation or partnership derives income from sources within the United States, and, if so, what is the measure for determining the amount of income derived from such sources.

(1) R. Burleigh and Sons, a corporation organized under the laws of Scotland, owns and operates two saw mills in the United States, one at Dermott, Arkansas, and the other at Dawson Springs, Kentucky. The mills saw logs into plank squares called 'handle blanks' and also roughly turn hammer handles. These products are all exported to Glasgow where they are finished at the home mill. In addition the manager of the American plant buys logs in the United States and exports them as such to Great Britain. No part of the products of the mills located in this country or of the logs purchased here is sold in the United States but the entire output is sold in Great Britain. The

plants and operations of the manager in the United States are conducted solely from funds sent to this country from the home office in Glasgow, Scotland, and no funds are sent to the home office from the American plants.

Section 213(*a*) of the Act of February 24, 1919, defines gross income as follows:

> Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> (*a*) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (*b*) of section 212, any such amounts

are to be properly accounted for as of a different period * * *

Section 233 (*b*) provides:

> In the case of a foreign corporation, gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States.

No income is derived from the mere manufacture of goods; before there can be income there must be sale; and there is no income from sources within the United States from goods manufactured here unless there is, in the language of Section 233(*b*), both 'manufacture and disposition of goods within the United States.' The obvious purpose of this section is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad, and without being disposed of by the owner in this country. I conclude, therefore, that when Burleigh & Sons manufacture or partially manufacture articles in this country but do not sell or dispose of them until they are taken to Scotland, there is no gross income from sources within the United States within the meaning of the Act.

As to the purchase and exportation of logs, since profits that may accrue from such transac-

tions are not specifically provided for in Section 233(*b*) if such gains or profits are gross income from sources within the United States, they must be so because they represent compensation from trades, businesses, commerce, etc., as enumerated in Section 213(*a*), which are carried on within the United States.

In Sulley *v.* Attorney General, 5 H. & N. 711 (2 B. T. C. 149), under a statute taxing the income of non-residents 'from any property whatever in the United Kingdom, or profession, trade, employment, or vocation exercised within the United Kingdom,' the facts are similar to those above stated. Sulley was a partner in a firm of general merchants and drapers carrying on business in both the United States and England. Sulley resided in England and the other partners in the United States. Sulley transacted the business of the firm in England, which consisted of purchasing goods in England and shipping them to the United States. No money was received in England except what was sent from the United States, and the profits of the business were made by the resale of goods at an increased price in the United States. The Court held that the liability to income tax attached only to such profits as came home to England as the share of Sulley, the partner resident there. The Lord Chief Justice said:

> The question is, whether there is a carrying on or exercise of the trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the subject matter of the statute. Wherever a merchant is established, in the course of his operations his

dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchaser of the goods to income tax. In the present case the defendant is a partner; but if the argument is well founded this American firm might be taxed in the same way if he had been merely an agent. It would be most impolitic thus to tax those who come here as customers. The subject of a foreign State, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed. But in the present case no profits are received by the firm, or exist in this country * * * The profits of the firm in America do not accrue in respect of any trade carried on in this country, but in respect of the trade carried on in New York, where the main business is conducted.

In State *ex rel.* Manitowoc Gas Co. *v.* Wisconsin Tax Commission, 161 Wis. 111, the Supreme Court of Wisconsin said:

If an income be taxed, the recipient thereof must have a domicile within the state, or the

property or business out of which the income issues must be situate within the state so that the income may be said to have a situs therein.

By a parity of reasoning I conclude that income which may accrue to Burleigh and Sons in England by sale of logs purchased in the United States is not income from sources within the United States.

* * * * *

(5) The Manchester Liners, Ltd., is a corporation organized under the laws of Great Britain, with its home office at Manchester, England, operating a line of freight steamships between Philadelphia, Pa., and foreign ports. The corporation has no office in the United States but consigns its steamships to Furness, Withy & Co., Ltd., at Philadelphia, who handles them as agents and brokers, together with steamships consigned to them by other owners. The agents see to the entry and clearance of each steamer and the discharge and loading of the cargo and supplies, collect such part of the freight as is prepayable in this country for the ocean carriage, deduct the amount of the agents' disbursements and charges for their services, and remit the balance to the steamship corporation at Manchester upon the departure of the vessel. Frequently a large part of the freight is not prepayable but is payable upon delivery of the goods at Manchester.

In an opinion rendered March 9, 1910, 28 Op. Atty. Genl. 211, Attorney General Wickersham decided that foreign steamship companies engaged in the business of transporting passengers, goods, and merchandise between ports in the United States and foreign ports, and maintaining passenger and

freight agencies in this country, are subject to the special excise tax provided in Section 38 of the Act of August 5, 1909, saying:

> * * * Their business consists entirely in transporting passengers and goods and merchandise between ports in this country and those of foreign countries, and receiving and discharging the same. Through agents located here all contracts and arrangements incident to such a business at this end of their lines are made, and all exports are delivered to their warehouses and loaded upon their vessels, and the passengers embark, while they are within the limits of the United States; and likewise while here their imports are unloaded and passengers from foreign ports disembark. If these companies do not transact business in the United States they transact no business in any foreign port, and their entire business is carried on upon the high seas. To such a conclusion I am unable to give assent.

A similar conclusion was arrived at in Erichsen *v.* Last, 8 Q. B. D. 414 (4 B. T. C. 422), which held that a cable corporation established at Copenhagen, with an agent and an office in London, with cables extending between England and Denmark, was carrying on trade in England from which profit arose on account of contracts entered into with persons in England to send messages from England to other countries. Brett, *L. J.*, said:

> * * * That which earns the profit, as I said at first, or that out of which they get the profit is the better phrase, is the money to be paid to them out of the contract, which contract is

made in England, and such contracts being habitually made by them in England, it seems to me, they carry on in England the trade or business of making such contracts. Therefore, it seems to me, that these people are properly said to be persons from whom this duty must be collected.

I am of the opinion that the Manchester Liners, Ltd. derives income from sources within the United States to the extent that it derives income from freight and passenger traffic originating within the United States.

Respectfully,

WM. L. FRIERSON,
Acting Attorney General.

To the Secretary of the Treasury."

It is important to note with reference to this opinion of the Attorney General that the decision of the English Court in Sulley *v.* Attorney General (*supra*), cited therein, holds that (see page 27, *supra*):

"Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place of business in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. * * * The subject of a foreign State, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Sim-

ply by the provision that whosoever carries on the business and receives the profits here shall be assessed."

It is thus evident that if American corporations had been engaged in the business of exporting in Great Britain, with capital invested in such business under the protection of the laws of that country, and in the transaction of such business had purchased or manufactured and exported goods; had sold such goods through agents in foreign countries; and received the proceeds of such sales within Great Britain in like manner as foreign corporations receive the proceeds within the United States from the business of exporting transacted by them within the United States, such American corporations would undoubtedly have been required to pay tax to Great Britain on the net income or profits derived from such business in Great Britain.

Under the Revenue Act of 1921 and all income tax laws enacted prior thereto, citizens of foreign countries residing within the United States and engaged in the business of exporting were required to pay tax on net income or profits derived therefrom, which business was transacted by them in the same or like manner as foreign corporations transacted the like business of exporting within the United States. The justification for the imposition of such tax must be found in the fact that such business was transacted by such resident alien individuals within the United States, and under the protection of the United States, and certainly no distinction can be drawn between such

business transacted by resident alien individuals and like business transacted by foreign corporations residing within the United States. That a corporation may reside in a country other than that in which it was organized, and from which it received its charter or franchise, is shown by the following citations from decisions by United States and English courts:

In St. Clair *v.* Cox (106 U. S. 350), this Court said (on p. 355):

> "* * * Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.
>
> All there is in the legal residence of a corporation in the State of its creation, consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should

not be equally deemed to represent it, in the States for which they are respectively appointed, when it is called to legal responsibility for their transactions."

In Zambrino *v.* Galveston, H. & S. A. Ry. Co. (38 Fed. 449), the Court said (on p. 453):

> "The English doctrine as to the competency of an American corporation to acquire a residence in England is stated by Justice Blackburn in Newby *v.* Fire Arms Co. In that case the defendant corporation had a place of business in England and there *de facto* carried on its business, just as an English corporation might have done, but the principal place of business and head office were in America. The Court said:
>
> > 'Such a corporation does, for many purposes, reside both in England and in its own country. * * * And in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there. L. R. 7 Q. B. 293, I Moak, Eng. R. 326, 327.'"

In the opinion of the Lord Chancellor in DeBeers Consolidated Mines Ltd. *v.* Howe (1906), 5 B. T. C. 198, it was said by the English court:

> "A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company."

And in Goerz *v.* Bell (1904), 2 K. B. 136, 150, the English court said:

> "Although the company, by getting itself registered in the South African Republic, undoubtedly desired, so far as that term is applicable to a company before incorporation, to take advantage of the laws of that country, yet, having regard to the constitution of the company as appearing from its articles, I can see nothing to prevent it after incorporation from residing elsewhere, either instead of, or as well as, in the South African Republic, and I think that the company did reside elsewhere. Of course it, or its promoters, intended to get the benefit of the law of the Transvaal, and did get it and no doubt the intention was that it should be a 'Boer' and not an 'Uitlander' company, and it got very substantial advantages in its operations by reason of its being incorporated there instead of in England; it was so incorporated on purpose. These facts show, in my opinion, that it was from the very first intended that the operations of the company might be mainly outside the Transvaal, and in fact they were mainly outside that country. Upon the dicta to be found in past decisions, I think this company must be taken to be resident in the United Kingdom."

In *Corpus Juris*, Vol. 14A, Sec. 3945, it is said (on p. 1240):

> "A corporation which seeks to establish a business domicile in a State other than that of its creation must take that domicile as individuals are always expected to do, subject to the responsibilities

> and burdens imposed by the laws which it finds in force there. It becomes amenable to the laws of the latter State and to the process of its courts, upon the same principle, and to the same extent as natural persons or domestic corporations."

It is to be noted also that Congress recognizes that foreign corporations transacting business within the United States are *resident* in the United States, by referring in paragraph 1 of Section 217 (*a*) of the Revenue Act of 1921 to such foreign corporations as "resident foreign corporations".

It will be observed that the Attorney General in his opinion of November 3, 1920, with respect to the Manchester Liners, Ltd., referred to (see pp. 29, 30, *supra*) an earlier opinion rendered by the Attorney General on March 9, 1910, under Section 38 of the Act of Congress, approved August 5, 1909 (36 Stat. at L., p. 112) which provided for an excise tax "with respect to the carrying on or doing business" in a corporate capacity, equivalent to one per centum of the net income received from the transaction of such business. That law provided (36 Stat. at L., p. 113) that foreign corporations should pay tax at the same rate as domestic corporations upon the amount of net income received from business transacted and capital invested within the United States (see page 18, *supra*).

The Attorney General could not apply to the foreign steamship companies transacting business in the United States the exemption granted by Section 233(*b*) of the Revenue Act of 1918 to foreign corpora-

tions, because by the terms of that section the exemption was limited to foreign corporations which manufactured or acquired goods in the United States and disposed of the same in foreign countries. The contrast between the taxation of the foreign steamship companies and the exemption of the foreign manufacturing and mercantile companies under this Act illustrates the lack of reason for the discrimination in favor of foreign exporting companies in that and the following Act, and the peculiarly hostile character of the discrimination against the plaintiff in error under the Acts of 1918 and 1921.

It will also be observed that under Sections 217 and 233 of the Revenue Act of 1921, which are continued without change in the Revenue Act of 1924, foreign corporations engaged in the business of transporting passengers and freight between ports in the United States and foreign ports are only required to pay tax on such part of the income as may be derived from the transportation of such passengers and freight rendered within the United States.

Treaty Rights Under Which Foreign Corporations Carry on Business in the United States.

An illustration of the rights granted by treaties of the United States to aliens (including alien corporations) to carry on business in the United States, and of the protection given to them in their business enterprises in this country by the Constitution of the United States,

is given in the opinion of this Court in the case of Terrace *v.* Thompson, decided November 12, 1923 (United States Supreme Court Advance Opinions 1923-1924, No. 3, p. 35), which dealt with the contention that certain provisions of the Anti-alien Land Law of California were in conflict with the due process and equal protection clauses of the 14th Amendment and with the treaty between the United States and Japan of February 21, 1911 (37 Stat. at L., 1504). This Court, after declaring again that the Constitution of the United States protects the alien inhabitant of the United States "in his right to earn a livelihood by following the ordinary occupations of life" (p. 37), and that "alien inhabitants of a state, as well as all other persons within its jurisdiction, may invoke the protection" of the due process and equal protection clauses of the 14th Amendment (p. 38), quoted (p. 40) from the provisions of the aforesaid treaty with Japan as follows:

> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is well known that under these treaty provisions and Constitutional protection a considerable number of Japanese corporations are actively engaged within the United States in the business of exporting, and are competing with American corporations engaged in like business, and that some of these Japanese corporations have employed capital in such business in the United States to the extent of many million of dollars, with extensive stores, warehouses, etc. It is also well known in commercial circles that such Japanese, with other Asiatic or foreign, corporations now carry on a large part of the foreign commerce of the United States with Asiatic countries, having been greatly assisted by the total exemption from the payment of tax on net income or profits derived from their export trade.

Similar treaties, with similar provisions permitting the corporations of foreign countries to lease or acquire factories, warehouses, etc., and to carry on any kind of manufacturing or commercial business in the United States on the same terms as American corporations, have been made between the United States and practically all the other civilized countries in the world; and under the decisions of this Court herein referred to it is clear that if such treaties had provided, as the Act of Congress in the case of the plaintiff in error provides, that corporations organized under the laws of such foreign countries should be favored by entire immunity from taxation or preferential treatment in export trade as compared with American citizens or corporations, ***such provision in such treaties would be contrary to due process of law.***

Disadvantages Encountered by American Corporations in Export Trade.

In further illustration of the competitive disadvantages to which our American corporations engaged in foreign trade were subjected by the discriminating taxation which is complained of in the case of the plaintiff in error, it is to be noted that Canada and Great Britain, with whose people our exporters must compete in world markets, give to their corporations exemption from their income taxes with respect to trade outside of their own countries. For example, Canada, in her Income Tax Law (7 and 8 Geo. V., c. 28, as amended in 1918) exempted from tax

> "the income of incorporated companies whose business and assets are carried on and situated entirely outside of Canada."

Similarly, it was decided in Great Britain (Egyptian Hotels, Ltd. *v.* Mitchell (1915) H. L.) that under the British Income Tax Law a British corporation which had amended its Articles of Association so as to permit its business in Egypt to be managed by directors there, and had so managed and directed its business there, was not doing business in the United Kingdom or due to pay income tax to the United Kingdom with respect to its Egyptian business, notwithstanding that the corporation had a General Board of Directors in England and raised its capital there.

The effect of these and other similar provisions by other great commercial nations whose corporations compete with our own in the difficult struggle for foreign trade, is that such foreign corporations, doing business in the United States and producing or purchasing commodities here and selling them in any part of the world outside of their own countries, have paid no income tax to their home governments on the proceeds of such trade. Such proceeds of such trade came back to such foreign corporations in the United States undiminished by such taxation either here or abroad, except that which was paid in the countries where the goods were sold, increasing, of course, their working capital and financial resources here, while like proceeds of like trade by American corporations were compelled to pay the heavy taxes of the Revenue Acts of 1918 and 1921.

Cooley on the Restrictions Imposed by the "Due Process of Law" Provisions.

In Judge Cooley's works on Taxation and Constitutional Limitations the principles settled by the courts with respect to the meaning and purpose of the constitutional guarantee of "due process of law" as applied to taxation have been very clearly stated, and the following citations from Judge Cooley's works set forth the restrictions imposed by the "due process of law" provisions of the Constitution.

In Cooley on Taxation (Third Edition), in the chapter entitled "Taxation and Protection Reciprocal", it is said (Vol. I, p. 23):

"Alienage itself does not work an exemption if the alien is domiciled in the country, so far at least as he has property there to be protected by its laws; and tangible property in the country, as stock in trade or manufacture, or for sale, is taxable irrespective of the residence or allegiance of owners."

In the chapter entitled "Equality and Uniformity in Taxation" it is said (Vol. I, pp. 259-261):

"It has already been stated that inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax exclusively on merchants' goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a particular portion of the taxing district or because the

persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of moneys were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

In Cooley's Constitutional Limitations it is said (on pp. 707 and 708):

"Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike protected, so all alike should bear the burden, in proportion to the interests secured. Taxes by the poll are justly regarded as odious and are seldom resorted to for the collection of revenue; and when taxes are levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions."

And (on page 723):

"To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that

paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by an enlightened or responsible government."

The Meaning of Due Process of Law as Defined by the Supreme Court.

In Dent *v.* West Virginia (129 U. S. 114) this Court very clearly defined the meaning of the "due process of law" clause, which appears in both the Fifth and Fourteenth Amendments of the Constitution. The Court said (on pp. 121-124):

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

* * * * * *

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will

embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land'. *In this country, the requirement is intended to have a similar effect against legislative power,* that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation upon the subjects to which it relates,* and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case. *The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens."* (The italics are ours.)

And this Court has determined also that legislation is arbitrary and capricious when it makes a discrimination depending on nationality or allegiance. In American Sugar Refining Co. *v.* Louisiana (179 U. S. 91) this Court had under consideration a statute of Louis-

iana imposing a license tax on the business of refining sugar and molasses, in which it was provided that the tax should not apply to "planters and farmers grinding and refining their own sugar and molasses". It was contended that this discrimination was in violation of the Fourteenth Amendment of the Constitution. The Court said (on p. 92):

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. *Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations,* or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws of the less favored classes." (The italics are ours.)

It is thus clearly established that discrimination in taxation which is made to depend on nationality or allegiance, as in the law in the case of the plaintiff in error, is arbitrary, oppressive or capricious, and hence in violation of the "due process of law" provision of the Fifth Amendment of the Constitution.

In Lappin *v.* District of Columbia (22 App. D. C. 68) the principles laid down by this Court with respect to the taking of property without due process of law were summed up and applied to the taxation imposed by the Act of Congress of July 1, 1902 (32 Stat.

at L., Chap. 1352) whereby general brokers in the District of Columbia paid a license tax of $250.00 per year, and brokers who were members of regular exchanges located outside of the District of Columbia and transacting a brokerage business therein paid a license tax of only $100.00 per year. The Court of Appeals of the District of Columbia in that case, citing Dent *v.* West Virginia (*supra*), held that this discriminating tax was in violation of the "due process of law" clause of the Fifth Amendment, and said:

> "The undoubted right to pursue any legitimate trade, calling or profession, subject only to such reasonable regulations in the interest of the public welfare as may be imposed upon all persons under like conditions, 'may, in many respects be considered as a distinguishing feature of our republican institutions.' Dent *v.* West Virginia, 129 U. S. 114. And, as was said in that case: 'The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors and cannot arbitrarily be taken away from them any more than their real and personal property can be thus taken. See also Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. and S. H. Co., 111 U. S. 757; Curry *v.* District of Columbia, 14 App. D. C. 423, 441.
>
> "If then, the direct prohibition of one person or class of persons from engaging in a calling that is open to others similarly situated is clearly beyond the legislative power, it must follow that the same purpose cannot be indirectly accomplished through

arbitrary taxation imposing upon one a burden greater than that to be borne by the others. As was said in Curry *v.* District of Columbia, 14 App. D. C. 423, 441: *'If discrimination is allowable, prohibition is allowable; and both are equally obnoxious to our free institutions. Indeed, to our ordinary sense of justice, discrimination is more obnoxious than prohibition.'"* (The italics are ours.)

* * * * *

"The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors upon less onerous terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefor within the prohibition of the 5th Amendment of the Constitution."

Aliens in the United States Protected by the Due Process of Law Provisions of the Constitution.

The principle expressed by the "due process of law" provision of the Fifth and Fourteenth Amendments was very clearly stated by this Court in Yick Wo *v.* Hopkins (118 U. S. 356). That case dealt with an ordinance of the city and county of San Francisco, which made it unlawful for any person or persons to carry on a laundry there without having first obtained the consent of a Board of Supervisors "except the same be located in a building constructed either of brick or stone". Although this ordinance appeared to be fair

on its face, yet its necessary effect, as stated by this Court, was to drive the Chinese laundries out of business, and hence the ordinance deprived the proprietors of such laundries of their property without due process of law.

In the statement of the case by Mr. Justice Matthews, it was said (on p. 362):

> "* * * And if, by an ordinance, general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the National Constitution, then the insertions of provisions to guard the rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the city and county of San Francisco, to the adjoining counties, beyond the convenient reach of customers, either of which results would be little short of confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result."

And in the opinion of the Court, delivered by Mr. Justice Matthews, it was said (on pp. 373, 374):

> "* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Applying the principle of this decision to the case of the plaintiff in error, an American corporation carrying on the business of exporting, it is clear that such a deprivation of property as was sought to be inflicted upon the Chinese by the discriminating ordinance of San Francisco has been inflicted contrary to due process of law upon the plaintiff in error in its business of exporting by the discrimination complained of in the case at bar. With its income from such business heavily taxed while the like income of foreign corporations and nonresident alien individuals engaged in such business is entirely exempted from tax, the effect is necessarily to drive such business out of the hands of the plaintiff in error or other American corporations so taxed, and into the hands of the exempted foreign corporations and alien individuals, with the loss by the American corporations of the capital invested by them in such business.

In the opinion in Brushaber *v.* Union Pacific R. R. Co. (240 U. S. 1), delivered by Mr. Chief Justice White, this Court said (on p. 24):

> "So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that *this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*"

It is submitted that it would be impossible to draft a law taxing income which would be more *"wanting in basis for classification"* or wherein any more *"gross and patent inequality" in taxation would result* than that which is complained of by the plaintiff in error in the case at bar. Compared with the competing foreign corporations the occupation is the same (the business of

exporting carried on in the United States); the circumstances and conditions under which this competition is carried on are identical; and hence it would be impossible to discriminate against the plaintiff in error in this case without basing the classification on *nationality or allegiance,* or something equally arbitrary and capricious, *which is precisely what this Court has said Congress cannot do without thereby taking property contrary to due process of law.*

The Fundamental Principle of Equality of Application of the Law.

In Truax *v.* Corrigan (267 U. S. 334) this Court, speaking by Mr. Chief Justice Taft, said (on p. 332):

> "The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal government, while the equality clause does not appear in the 5th Amendment, and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Hurtado *v.* California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. It, of course, tends to

> secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. *Our whole system of law is predicated on the general fundamental principle of equality of application of the law.* 'All men are equal before the law'; 'This is a government of laws, and not of men'; 'No man is above the law',—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws." (The italics are ours.)

It is submitted that this "general fundamental principle of equality of application of the law", has been violated in the case of the plaintiff in error, since under the Revenue Act of 1921 it was taxed on income from its business of exporting when foreign corporations engaged in like business within the United States, under the same or like circumstances and conditions, were wholly exempted from like taxation.

In Hurtado *v.* People of California (110 U. S. 516) this Court said (on p. 536):

> "* * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations

by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In Smyth *v.* Ames (169 U. S. 466) this Court said (on p. 527):

"The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

In Hayes *v.* Missouri (120 U. S. 68) this Court said (on pp. 71, 72):

"The Fourteenth Amendment of the Constitution of the United States does not prohibit legislation which is limited either in the objects to which

it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier *v.* Connelly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' 113 U. S. 27, 32."

The Due Process of Law Principle Applied to Income Tax with Respect to Situation Like That of the Plaintiff in Error.

In Shaffer *v.* Carter (252 U. S. 37) this Court dealt with a law enacted by the State of Oklahoma taxing the net income of its residents from whatever source derived. With respect to nonresidents this law provided that a like tax "shall be levied, assessed, and collected and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on" therein by persons residing elsewhere.

It was contended by Shaffer, who resided in Illinois and carried on an oil business in Oklahoma, and shipped to, and sold in other States, or foreign countries, the products of such business, that because he resided in another State he was not liable for tax by Oklahoma on the

net income derived from such business. This Court in deciding that Oklahoma had jurisdiction to impose tax upon such net income held that Shaffer had no right to be favored by "discrimination or exemption" and hence, if the law had exempted from tax the income of non-residents engaged in such business in Oklahoma, the collection of tax from the residents of that State engaged in like business would have been contrary to the "due process of law" provision of the Fourteenth Amendment of the Constitution, and also would have imposed a direct burden on the like interstate commerce transacted by residents of Oklahoma.

The following citations from the opinion, delivered by Mr. Justice Pitney, set forth the reason of this principle of law, and clearly show that it is applicable to the case of the plaintiff in error.

This Court said (on pp. 49-51):

> "Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the state by action taken within its borders, either *in personam* or *in rem*, according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture or franchise, or the like; and the jurisdiction to act remains even though all permissible measures be not resorted to. Michigan Trust Co. *v.* Ferry, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; *Ex parte* Indiana Transp. Co., 244 U. S. 456, 457, 61 L. ed. 1253, 1255, 37 Sup. Ct. Rep. 717."

* * * * *

The contention that a state is without jurisdiction to impose a tax upon the income of nonresidents, while raised in the present case, was more emphasized in Travis *v.* Yale & T. Mfg. Co. decided this day (252 U. S. 60, post. 460, 40 Sup. Ct. Rep. 228), involving the Income Tax Law of the state of New York. There it was contended, in substance, that while a state may tax the property of a nonresident situate within its borders, or may tax the incomes of its own citizens and residents because of the privileges they enjoy under its Constitution and laws and the protection they receive from the state, yet a nonresident, although conducting a business or carrying on an occupation there, cannot be required through income taxation to contribute to the governmental expenses of the state whence his income is derived; that an income tax, as against nonresidents, is not only not a property tax, but is not an excise or privilege tax, since no privilege is granted; the right of the noncitizen to carry on his business or occupation in the taxing State being derived, it is said, from the provisions of the Federal Constitution.

This radical contention is easily answered by reference to fundamental principles. In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; *they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to*

governments to resort to all reasonable forms of taxation in order to defray the governmental expenses."

* * * * *

"In well ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

Income taxes are a recognized method of distributing the burdens of government, *favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay."* (The italics are ours.)

And (on pp. 52, 53):

"And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and resi-

dents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to nonresidents. (New Orleans *v.* Stempel, 175 U. S. 309, 320, *et seq.*, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; Bristol *v.* Washington County, 177 U. S. 133, 145, 44 L. ed. 701, 707, 20 Sup. Ct. Rep. 585; Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L. E. A. 1915C, 903, 31 Sup. Ct. Rep. 550), and sustaining Federal taxation of the income of an alien nonresident derived from securities held in this country (DeGanay *v.* Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524).

That a state, consistently with the Federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held or his occupation or business

carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Sec. 2 of Art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See Ward *v.* Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452."

The Court then cited the income tax laws enacted by Congress since 1861 and called attention to the fact that the income tax law of 1913 (38 Stat. at L. 166, 4 Fed. Stat. Anno. 2nd Ed. p. 326) which imposed tax upon the entire net income from "all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere" evidently furnished the model for Section 1 of the Oklahoma statute taxing nonresidents. The Court then said (on p. 54):

"*No doubt is suggested* (the former requirement of apportionment having been removed by constitutional amendment) *as to the power of Congress thus to impose taxes upon incomes produced within the borders of the United States or arising from sources located therein even though the income accrues to a nonresident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the 14th Amendment imposes*

no greater restriction in this regard upon the several states than the corresponding clause of the 5th Amendment imposes upon the United States." (The italics are ours.)

It is submitted that the only interpretation which can be placed on the last paragraph of the above citation, with respect to the issue in the case of the plaintiff in error, is that the due process clause of the 5th Amendment restricts Congress to the condition that income taxes derived from the business of exporting, in order to be valid, must be imposed equally on all persons under like circumstances and conditions. The conclusion is unavoidable, that when, as in the law under consideration in the case of the plaintiff in error, the discrimination is made to depend on nationality or allegiance, which under the fundamental requirement governing both Federal and State taxation can have no reasonable relation to the business of exporting carried on within the United States by foreign corporations, then the imposition by Congress of the tax upon the income of the plaintiff in error as an American corporation was in violation of the due process clause of the 5th Amendment.

And, in Shaffer *v.* Carter (*supra*) this Court further said (on p. 55):

> "The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition, and that his management was exerted from his place of business in another state, did not deprive Okla-

homa of jurisdiction to tax the income which arose within its own borders. The personal element cannot, by any fiction, oust the jurisdiction of the state within which the income actually arises, and whose authority over it operates *in rem.*"

And (on p. 57):

"It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499. Ann. Cas. 1918E, 748. Compare William E. Peck & Co. *v.* Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432."

And (on p. 59) it is said:

"Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the *lien will rest upon the same property interests which were the source of the income upon which the tax was imposed.*" (The italics are ours.)

The Tax Discrimination Against Plaintiff in Error in Violation of Due Process of Law.

In Raymond *v.* Chicago Union Traction Co. (207 U. S. 20) this Court held that the assessment, by the state board of equalization of Illinois, of the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which resulted in enormous disparity and discrimination, was in violation of the "due process of law" and "equal protection of the laws" provisions of the 14th Amendment of the Constitution of the United States. And in Truax *v.* Raich (239 U. S. 33) this Court again declared that a discrimination against aliens in the United States with respect to "the ordinary means of earning a livelihood", "because of their race or nationality", was in violation of the 14th Amendment. The Court said (on pp. 41 and 42):

> "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, *because of their race or nationality, the ordinary means of earning a livelihood.* It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal

> freedom and opportunity that it was the purpose of this Amendment to secure. * * *If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.* It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare'. The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved." (The italics are ours.)

And (on p. 43):

> "The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law."

It is settled that corporations are persons within the meaning of the "due process of law" and "equal protection of the laws" clauses of the 14th Amendment and of the "due process of law" clause of the 5th Amendment; and hence it is clearly settled by this Court that a discrimination in taxation against American corporations in a lawful business in the United States, and in favor of alien corporations carrying on like business in the United States is in violation of the "due process of law" clause of the 5th Amendment, for it cannot be seriously suggested that a discrimination which violates this

clause when it is directed against the alien does not violate the clause when directed against the citizen. To so contend would be equivalent to asserting that Congress has power to force American citizens to expatriate themselves in order to *"obtain support in the ordinary fields of labor"* or to protect their property in the United States from injury or confiscation. In the decision of this Court in Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. and S. H. Co. (111 U. S. 746) it was said (in the concurring opinion by Mr. Justice Field, on p. 757):

> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. *The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.*" (The italics are ours.)

And in Soon Hing *v.* Crowley (113 U. S. 703) this Court also said (on p. 709) that

> "the discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

In Heisler *v.* Thomas Colliery Co. (260 U. S. 245) this Court dealt with the contention that the imposition by the State of Pennsylvania of a special tax on anthracite coal mined and prepared for market in that State, without the imposition of a like tax on bituminous coal, thereby denied to the plaintiff in that case the equal protection of the laws guaranteed by the 14th Amendment. The Court, by Mr. Justice McKenna, said (on p. 255):

> "In its exercise in taxation, we have said, it is competent for a state to exempt certain kinds of property and tax others, *the restraints upon it only being against clear and hostile discriminations against particular persons and classes.*" (The italics are ours.)

So if the law in that case had exempted from the tax all anthracite coal mined in Pennsylvania by corporations not organized under the laws of Pennsylvania and sold by them beyond the borders of that State, it is clear that it would be held that such tax could not be applied to the coal mined by a Pennsylvania corporation, because in such case the hostile discrimination would have been "against particular persons and classes", and hence in violation of both the due process of law and the equal protection of the laws clauses of the 14th Amendment. This is exactly the situation of the plaintiff in error in the case at bar.

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (247 U. S. 165, cited on pp. 74-77, *infra*), this Court, in dealing with the net income of an American

corporation derived from its exporting business carried on in the United States, which business, as the Court stated, consisted of "buying goods in the several States, shipping them to foreign countries and there selling them", declared that the status of the net income from such business *"is not different from that of the exported articles prior to the exportation"*. It is evident that if such net income did not have such status, it would necessarily be related to the activities of exporting, and hence to tax it would be in violation of Paragraph 5 of Section 9 of Article 1 of the Constitution. That a tax on such net income, irrespective of whether the goods are sold within or without the state, is like a tax on property in the state, is stated by this Court in United States Glue Co. *v.* Oak Creek (247 U. S. 321, cited on pp. 83-85, *infra*), and in Underwood Typewriter Co. *v.* Chamberlain (254 U. S. 113); and is confirmed in Shaffer *v.* Carter (*supra*). Hence, if Congress is not restrained by the "due process of law" clause of the Fifth Amendment from making the discrimination in favor of foreign corporations which is complained of in the case of the plaintiff in error, with respect to the business of exporting carried on in the United States, then Congress would not be restrained from making a discrimination exempting foreign corporations from the payment of customs duties on articles imported into the United States while imposing such duties on American corporations; or from making a discrimination exempting foreign corporations from the sales taxes paid by manufacturers, producers, and importers on domestic

sales, while imposing such taxes on such sales by American corporations; or from making a discrimination exempting foreign corporations in the business of insurance, or banking, or building, or any other business in the United States, from income or profits tax, or capital stock tax, or any other sort of tax which Congress can impose, while levying such tax upon American corporations engaged in like business. To use the words of this Court in Shaffer *v.* Carter (*supra*), such a proposition would be so wholly inconsistent with fundamental principles as to be refuted by its mere statement.

The Opinion of the District Court.

In the opinion of the District Court, it is said (Record, pp. 7, 8):

> *"It is admitted by the Government that the Acts of 1909 and 1913, the wording of which differs slightly from that of the Act of 1918, were in practice applied, at least to some extent, to foreign corporations in respect of income derived from the sale in foreign countries of goods manufactured or acquired in the United States.* It is unnecessary, however, here to consider the proper interpretation to be given to the Acts of 1909 and 1913 or the Act of 1918 as applied to foreign corporations, since I am satisfied of the constitutionality of the law as applied to the plaintiff, even though the income of foreign corporations from like sources is construed to be exempt.
>
> There is, as is now conceded, no question as to the power of Congress to tax the net income

of domestic corporations derived from their export business. The question as to how far it is wise and proper to extend our taxing laws to foreign corporations that manufacture or acquire goods in this country and sell them abroad, involves many economic and political considerations. These are peculiarly within the province of Congress, not the Courts.

* * * * *

* * * So long as the tax on American corporations is measured by net income, actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for any particular contracts, even if it could be assumed that foreign competitors were subject to no equivalent taxation by their own governments. Clearly, however, such a handicap or discrimination does not make the classification such a grave abuse or oppression as to condemn the law as a denial of due process within the Fifth Amendment. For to bring it within this condemnation it must be, as the Supreme Court said in Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1, 24, 25:

> 'A case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.'

In La Belle Iron Works *v.* United States. 256 U. S. 337, 392, 393, the Court again points out:

> " 'The Fifth Amendment has no equal protection clause, and the only rule of uniformity prescribed with respect to duties, imports, and excises laid by Congress is the territorial uniformity required by Art. 1, Sec. 8, * * *. The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required by the States under the equal protection clause, much less of Congress under the more general requirements of due process of law in taxation. * * * The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. * * * If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the tests applied.' "

(The italics are ours.)

This opinion states the admission by the Government that under the Act of Congress of August 5, 1909 (36 Stat. at L., Ch. 6), and the Act of Congress of October 3, 1913 (38 Stat. at L., Ch. 16) the foreign corporation transacting the business of exporting within the United States with capital invested within the United States in such business was taxed upon its income from such business (see pp. 17-19, *supra*).

As to the view of the District Court that Congress may discriminate in its taxing laws by exempting

"foreign corporations that manufacture or acquire goods in this country and sell them abroad" while taxing domestic corporations doing the same thing, for the reason that the taxation of such foreign corporations "involves many economic and political considerations", it is sufficient to say that if such considerations could be invoked to set aside the Constitutional requirement that all persons engaged in the same occupation in the United States under the same circumstances and conditions must be treated alike with respect to taxation, then all rights of life, liberty or property would be at the mercy of Congress. The statement of the District Court is to the effect that Congress, for its own reasons of policy, whatever they may be, can tax the export trade carried on here by our own people at any rate while exempting entirely the like trade carried on here by persons or corporations of foreign allegiance, discriminating against our own people solely on the ground of such foreign nationality or allegiance of those favored by exemption. If Congress can do this with respect to export trade, it can, of course, do likewise with respect to import trade, or with respect to any trade or business carried on in any part of the United States.

As to the statement by the District Court that "so long as the tax on American corporations is measured by net income actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for any particular contracts even if it could

be assumed that foreign competitors were subject to no equivalent taxation by their own governments", it may be said that the complaint in the case of the plaintiff in error relates entirely to the discrimination against its business of exporting in the taxation imposed by the Congress of the United States, and is not concerned with the taxation imposed by the governments of foreign countries. As a matter of fact, the taxation of income or other taxation imposed by foreign governments upon the business activities carried on within their jurisdiction always falls alike upon all who carry on such activities there, whether their own people or aliens; and all such taxes are expenses deducted in computing net income taxed by the United States.

With reference to the citations by the District Court from Brushaber *v.* Union Pacific R. R. Co. (*supra*) and La Belle Iron Works *v.* United States (*supra*), it is submitted that they fully sustain the contention of the plaintiff in error. Applying the language of the Court in the Brushaber case, it is clear that the law in the case at bar *"was so wanting in basis for classification as to produce a gross and patent inequality"* because the discrimination against the plaintiff in error was made to depend *wholly upon difference of nationality or allegiance,* which discrimination this Court has declared would be arbitrary, capricious, or oppressive.

In La Belle Iron Works *v.* United States (*supra*) the Court said (on p. 393):

> "The Act treats all corporations and partnerships alike, so far as they are similarly circum-

stanced. *As to one and all, Congress adjusted this tax, generally speaking, on the basis of excluding from its operation income to the extent of a specified percentage (7 to 9 per cent) of the capital employed, but upon condition that such capital be valued according to what actually was embarked at the outset or added thereafter, disregarding any appreciation in values.* If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to difference in their circumstances, not to any uncertainty or want of generality in the test applied." (The italics are ours, and the words italicized were omitted from the citation by the District Court.)

In the case at bar there was no difference in the circumstances and conditions under which the business of exporting was carried on by the plaintiff in error and foreign corporations, nor was the law general in its operation, since, in the same occupation or business within the United States, it taxed the net income of the plaintiff in error derived therefrom, and entirely exempted from tax the like income of foreign corporations, and hence it is clear that the reasoning of this Court in both of the cases cited by the District Court sustains the contention of the plaintiff in error.

SECOND.

The said alleged taxation imposed upon the said net income or profits of the plaintiff in error's said business of exporting transacted in the United States with capital invested in the United States by the plaintiff in error, constituted a direct burden on and an impediment to the plaintiff in error's said business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State", inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of exporting transacted in the United States with capital invested in the United States by said foreign corporations was wholly exempted under the same law from like taxation.

The Decision in the Peck Case.

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*), this Court dealt with the general tax of one per cent. on net income imposed by the Income Tax Law of 1913. The plaintiff in that case was carrying on the business of exporting in the United States with capital invested in the United States. The Court, in its opinion by Mr. Justice Van Devanter, said (on p. 172):

> "The plaintiff is a domestic corporation chiefly engaged in buying goods in the several States,

shipping them to foreign countries and there selling them. In 1914 its net income from this business was $30,173.66, and from other sources $12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them."

In this opinion this Court held (on p. 173) that under Paragraph 5 of Section 9 of Article I of the Constitution Congress is forbidden to tax articles in course of exportation; the act or occupation of exporting; bills of lading for articles being exported; charter parties for the carriage of cargoes from State to foreign ports; and policies of marine insurance on articles being exported; and then said (on pp. 173-175):

* * * "In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation.' Fairbank *v.* United States, 181 U. S. 292, 293. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation. Thames and M.

M. Ins. Co. *v.* United States, 273 U. S. 19. In this view it has been held that the clause does not condemn or invalidate charges or taxes not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus, a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in Pace *v.* Burgess, 92 U. S. 372, and Turpin *v.* Burgess, 117 U. S. 504, and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in Cornell *v.* Coyne, 192 U. S. 418. In that case it was said, p. 427: 'The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.' "

* * * * *

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid *generally* on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton *v.* Baltic Mining Co., 240 U. S. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its

source, *or in a discriminative way,* but just as it is laid on other income. The words of the Act are 'net income arising or accruing from all sources'. *There is no discrimination.* At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. *Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.* If articles manufactured and intended for export are subject to taxation under *general* laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under *general* laws. *In that respect the status of the income is not different from that of the exported articles prior to the exportation."* (The italics are ours.)

It is to be noted that in this decision the Court pointed out that the tax was "general" in its application and was not laid "on income from exportation because of its source or in a discriminative way." The tax was imposed likewise and equally upon all net income derived from the business of exporting transacted in the United States, whether by American corporations and citizens or by foreign corporations and alien individuals resident or nonresident; and such net income, like net income from other sources, was taxed as an item of

personal property which the recipient is free to use as he chooses, and which by virtue of the Sixteenth Amendment could be taxed as property in the United States without apportionment.

The Discriminating Tax a Burden on the Export Commerce of the Plaintiff in Error.

In the case at bar, however, the tax is not "general" in its operation upon the subject to which it relates, since it is laid "in a discriminative way" for the reason that the tax imposed upon the net income or profits of the plaintiff in error derived from the business of exporting transacted within the United States was not likewise imposed on the net income or profits of foreign corporations derived from the like business of exporting transacted by such foreign corporations within the United States with capital invested in said business by such foreign corporations within the United States. Hence such discrimination against the plaintiff in error imposed a direct and immediate burden on its business or occupation of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, under the principle repeatedly declared by this Court, and which is clearly stated in I. M. Darnell & Son Co. *v.* Memphis (208 U. S. 113).

In that case the opinion of this Court, by Mr. Justice White, sets forth that the Constitution of the State of Tennessee adopted in 1870 provided that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees"; and that

an act of the legislature of 1903, after providing that "all property—real, personal, and mixed—shall be assessed for taxation for state, county, and municipal purposes, except such as is declared exempt in the next section", provided further in the following section that there should be exempt from taxation "manufactured articles from the produce of the state in the hands of the manufacturer". In stating the case the Court said (on p. 116):

> "For more than three years prior to January 30, 1905, the I. M. Darnell Son & Company, a corporation of Tennessee, was domiciled in Memphis, in that state, and there owned and operated a lumber mill. Shortly prior to the date just named, pursuant to chapter 366 of the acts of Tennessee for 1903 (Tenn. Acts 1903, pp. 1097-1101), the value of the personalty of the Darnell Company was assessed for taxation by the city of Memphis at $44,000. Of this amount $19,325 was the value of logs cut from the soil of states other than Tennessee, which the company had brought into Tennessee from other states, and were held by the company as the immediate purchaser or vendee, awaiting manufacture into lumber, or consisted of lumber already manufactured by the company from logs which had been acquired and brought into the state from other states, as above mentioned, and all of which lumber was lying in the mill yard of the company, awaiting sale. The Darnell Company protested against this assessment, asserting that it was not liable to be taxed on said sum of $19,325, the value of the property owned by it as the immediate purchaser of logs brought from

other states, or lumber, the product thereof. The ground of the protest was that the property represented by the valuation in question could not be taxed without discriminating against it, as like property, the product of the soil of Tennessee, was exempt from taxation under the Constitution and laws of that state, and therefore to tax its said property would violate the commerce clause (Sec. 8, Article I) of the Constitution, and the equal protection clause of the 14th Amendment."

In the opinion holding that the tax collected from I. M. Darnell & Son Company imposed a direct burden upon interstate commerce since the law of Tennessee in terms discriminated against property the product of the soil of other States, notwithstanding that the property so taxed, as stated by this Court, "had come to rest and had been commingled with the mass of property within the State", the Court said (on pp. 120 and 125):

"The leading cases announcing the doctrine that a state may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are Woodruff *v.* Parham and Brown *v.* Houston, *supra.* But in both those cases it was sedulously pointed out that the power which was thus recognized did not, and could not, include the authority to burden the property brought from another state with a discriminating tax. In American Steel & Wire Co. *v.* Speed, 192 U. S. 519, 48 L. ed. 546, 24 Sup. Ct. Rep. 365, where the doctrine of Woodruff *v.* Parham and

Brown *v.* Houston was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon interstate commerce, property so situated must be taxed 'without discrimination, like other property situated within the state'."

* * * * *

"As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the state of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause of the 14th Amendment."

In Woodruff *v.* Parham (8 Wall. 123) cited in the Darnell case decision, this Court said (on p. 140):

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States

of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void."

And in Brown *v.* Houston (114 U. S. 622) cited also in the Darnell case decision, this Court said (on pp. 632, 633):

"* * * The coal had come to its place of rest, for final disposal or use and was a commodity in the market of New Orleans. * * * It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. * * * It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

* * * * *

"* * * With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some othe place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods

> of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed."

Since it is settled, by the decision in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) that the net income from the business of exporting in the United States has the same status as articles in the United States intended for exportation before exportation begins, that is to say, personal property at rest in the United States, and by the decision in I. M. Darnell & Son Co. *v.* Memphis (*supra*) that a tax upon such property, discriminating by means of an exemption with respect to the commerce through which the property came, is a direct burden upon such ccommerce, it is clear that the tax in the case of the plaintiff in error was a direct burden upon its export commerce.

It is settled that that which constitutes a burden upon interstate commerce must be a burden upon export commerce when applied thereto. In United States Glue Co. *v.* Oak Creek (247 U. S. 321) this Court dealt with a law enacted by Wisconsin taxing net income, and with the contention that certain items of the company's net income were not taxable because derived from interstate commerce. The Court applied to that case its decision in William E. Peck & Co. *v.* John Z.

Lowe, Jr., Collector (*supra*) relating to net income from export commerce, and said (on p. 329):

> "And so we hold that the Wisconsin Income Tax Law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, *and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business.*" (The italics are ours.)

In that case the Court explained the line of distinction between a tax upon the business of selling goods in foreign commerce measured by a percentage of the gross receipts, which is held unconstitutional no matter how small such percentage may be (Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292), and a tax upon such business measured by a percentage of the net income, such as was sustained in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*). In explanation of this distinction this Court said (on pp. 328 and 329):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and

workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. *Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profit has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, *like a tax upon property,* or upon franchises treated as property; and *if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government,* from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states." (The italics are ours.)

Comparing the declaration of this Court in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) that the tax was *"not laid on income from exportation because of its source or in a discriminative way"* with the similar declaration in United States Glue Co. *v.* Oak Creek (*supra*) that a tax on income derived from interstate commerce was within

the power of the states provided *"there be no discrimination against interstate commerce, either in the admeasurement of the tax or the means adopted for enforcing it"*, and comparing both declarations with the conclusion reached by this Court in I. M. Darnell & Son Co. *v.* Memphis (*supra*) to the effect that a tax on property in the State of Tennessee which had come to rest, and therefore was taxable by reason of its ownership, nevertheless imposed a direct burden on the interstate commerce through which it was brought into that state for the reason that like property the product of the soil of Tennessee was wholly exempt from like tax, it must necessarily follow that the tax on the net income of the plaintiff in error imposed a direct burden on its business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution, since foreign corporations carrying on the like business of exporting under the protection of the United States were wholly exempt under the law from like tax. And this burden was far more destructive in its effect than one resulting from a discrimination against all "exportation because of its source."

The Heavy Burden of the Tax.

It is to be noted that the tax in the case of William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) which tax, being *general* and not imposed in a discriminative way, was held to affect exportation only indirectly and remotely and not to be a direct burden on

exports, was at the low rate of one per cent. on net income, whereas the taxes imposed upon the net income of the plaintiff in error have been at much higher rates. While the income tax was at the low rate of one per cent., it was imposed alike upon all those engaged in the business of exporting in the United States; but when the rates of such tax rose to the highest figures ever imposed in the history of the country, the exemption for the foreign corporations was introduced, to add further to the burdens and difficulties of the exporting business of the plaintiff in error, a representative American corporation struggling to maintain its export trade. It was said by this Court in the case of William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*), reaffirming Brown *v.* Maryland (12 Wheat. 419), that the constitutional provision excepts from the range of the power of taxation "the act or occupation of exporting"; yet the plaintiff in error's acts and occupation of exporting have been taxed under the law here considered, by reason of this discrimination, and under the preceding law taxing net earnings which contained the same discrimination favoring the competing foreign corporations, at the rates of 10, 20, 30 or 40 per cent. or more of the net earnings of its exporting business. No argument is needed to show that discriminating taxation at such rates must necessarily have imposed a direct and destructive burden on the business of exporting carried on by the plaintiff in error, giving the foreign competing corporations such advantages as would ultimately force the plaintiff in error to abandon

its export commerce in order to prevent total loss of the capital invested therein.

In the annual report of the Secretary of the Treasury for the fiscal year ended June 30, 1919, in recommending the repeal of the excess-profits tax, he said (pp. 23, 24):

> "Still more objectionable is the operation of the excess-profits tax in peace times. It encourages wasteful expenditure, puts a premium on overcapitalization and a penalty on brains, energy and enterprise, discourages new ventures, and confirms old ventures in their monopolies. In many instances it acts as a consumption tax, is added to the cost of production upon which 'profits are figured in determining prices and has been, and will, so long as it is maintained upon the statute books, continue to be a material factor in the increased cost of living'."

This statement of the Secretary of the Treasury, although made without reference to the discrimination in the Revenue Act of 1918 (*supra*) against American corporations engaged in export trade, will serve to illustrate the extent of the direct burden imposed by the discriminating tax on the business of exporting carried on by the plaintiff in error.

In The Railroad Tax Cases (13 Fed. 722) the Court said (on p. 733):

> "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, *for it is in that form that oppressive burdens are usually laid.*" (The italics are ours.)

Similar Exemption to Nonresident Alien Individuals and Corporations of Porto Rico and The Philippine Islands.

It is to be noted that the law under which the alleged tax was assessed upon the plaintiff in error, known as the Revenue Act of 1921 (42 Stat. at L., Chap. 136) provided in Section 217(*a*) that nonresident alien individuals should have the same exemption that was granted to foreign corporations by Section 233(*b*) and 217(*e*) (see pp. 12, 13, *supra*) with respect to income derived from the business of exporting carried on in the United States. Likewise, in the preceding Revenue Act of 1918 (40 Stat. at L., Chap. 18) it was provided in Section 213(*c*) that nonresident alien individuals should have the same exemption that was granted to foreign corporations by Section 233(*b*) of that Act (see p. 15, *supra*) with respect to such income. It is well known in commercial circles that there are many firms or partnerships engaged in the exporting business in the United States which are composed of alien individuals, of whom nearly all are nonresident aliens. It is characteristic of such firms of aliens in the export trade that only one or two partners will reside in the United States (and hence be taxed on their income derived from the exporting business of the firm) while all the other partners will reside abroad (and hence be exempt from tax on their income derived from such business). It is to be noted also that under the prior laws of 1894, 1909, and 1913 (see pp. 16-19, *supra*) nonresident alien individuals, as well as foreign cor-

porations, were subject to the tax *with respect to income derived from business transacted and capital invested in the United States.* This was in harmony with the principle stated in Shaffer v. Carter (*supra*); and with the principle stated by the English Court in Sulley *v.* Attorney General (see pp. 27, 28, *supra*), wherein it was said:

> "Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, *viz.*, where his profits come home to him. That is 'where he exercises his trade'."

It is to be noted also that the said Revenue Act of 1921 contained the following provisions:

> "Sec. 2. * * * (4) The term 'foreign' when applied to a corporation or partnership means created or organized outside the United States;
>
> (5) The term 'United States' when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia;"
>
> * * * * * *
>
> "Sec. 260. That any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States, shall be subject to taxation under this title only as to income derived from sources within the United States, and in such case the tax shall be computed and paid

in the same manner and subject to the same conditions as in the case of other persons who are taxable only as to income derived from such sources."

Under the authority of these provisions individuals who were citizens of Porto Rico or the Philippine Islands (but not otherwise citizens of the United States) were granted the same exemption from the tax that was given to nonresident alien individuals under Section 217(*a*) of that Act; and corporations organized under the laws of Porto Rico or of the Philippine Islands, and carrying on the business of exporting within the United States, were granted the same exemption from the tax that was given by Sections 233(*b*) and 217(*e*) to corporations organized under the laws of foreign countries. (See Regulations 62 Relating to the Income Tax and War Profits and Excess Profits Tax under the Revenue Act of 1921, Arts. 1131-1133).

The Serious Situation in the Export Commerce of American Merchants.

The plaintiff in error's business of exporting must meet the competition, not only of all other merchants in that business in the United States, but also of merchants in all other parts of the world. In domestic business an occupation has protection by distance and duties on imports from the competition of merchants in foreign countries, but the American merchant in exporting business must meet the competition of such foreign mer-

chants in their own and other foreign countries, in the efforts to find foreign markets for American products.

The serious situation which confronts American merchants engaged in foreign commerce, under the tax discrimination which is complained of in the case of the plaintiff in error, was referred to by the Solicitor General in his motion to advance the hearing of the case at bar, wherein he stated that the report of the Federal Trade Commission (Report on Methods and Operations of Grain Exporters, published on May 16, 1922) showed that in the year 1921 foreign corporations exported more than half of all the wheat shipped from this country.

In an address by the Secretary of Commerce in New York City on November 8, 1923, before the American Marine Congress, which was published in the *New York Times* and the *Sun and Globe* on November 9, 1923, attention was called to the control acquired by foreign merchants over American exports and imports. A copy of this address, prepared for the press by the Secretary of Commerce, is submitted as an appendix to this brief (on pp. 98-105, *infra*). This address shows that, of the total quantity of American goods exported, by far the greater percentage are sold without the United States by foreign merchants who take delivery of such goods in the United States. It is well known that this was also the situation during the war with respect to the purchase of American products for export by foreign governments and merchants; and that during

the war foreign governments controlled most of the available cargo space on vessels sailing for Europe. Control of imports into the United States by foreign merchants necessarily means a large measure of control over exports from the United States, since the exports must be paid for largely from the proceeds of imports.

The Purpose of the Constitutional Provision Forbidding Taxation of Exportation.

In Fairbank *v.* United States (181 U. S. 283), wherein this Court said that no legislation can be tolerated which "destroys the spirit and purpose of the restriction imposed", reference was made to the reason and purpose of the Constitutional provision in Paragraph 5 of Section 9 of Article I, which was to prevent the possibility of any discrimination affecting the exportation of any articles produced in any state or section of the United States, and to make all exportation of all articles free from being a source of revenue to the national government. The Court said (on p. 293):

> "So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports."

The discriminating tax in the case of the plaintiff in error defeats the meaning and purpose of the Constitutional provision. Can it be supposed that the framers of the Constitution, who intended to prevent

any discrimination by taxation for or against the products or the exporting business of any of our citizens in any part of our country, intended to permit a discrimination in taxation in favor of the products and exporting business handled by foreign corporations and aliens in this country, and against the products and exporting business handled by our own citizens and corporations in their own country?

It is clear from the debates of the Constitutional Convention that the framers of the Constitution would have considered this provision violated by a tax law giving preference to the exporting business of corporations organized under the laws of any of the New England States, or of the Southern States, or of any other section; and for the same reason a tax law giving preference to the exporting business of foreign corporations violates this provision of Article I of the Constitution.

In Conclusion.

Briefly the plaintiff in error contends that the amount paid by it under the Revenue Act of 1921 on its net income or profits derived from the business of exporting which it carried on within the United States was not the exertion of taxation but the confiscation of its property in violation of the 5th Amendment of the Constitution of the United States because the like net income or profits of foreign corporations derived from the like business of exporting carried on by such for-

eign corporations within the United States and under the protection of the United States, with capital invested in such business within the United States by such foreign corporations, was wholly exempted from tax under said Revenue Act of 1921. The plaintiff in error also contends that since the foreign corporations with which it necessarily competed in such business of exporting within the United States were entirely exempted from tax on the net income or profits derived from the like business of exporting, such discrimination against the plaintiff in error imposed a direct burden on the property which it exported, and on its business of exporting, in violation of Paragraph 5 of Section 9 of Article 1 of the Constitution of the United States.

The judgment of the District Court should be reversed with costs, and the District Court directed to deny the motion made to dismiss the amended complaint.

Respectfully submitted,

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Appendix.

Address by Hon. Herbert Hoover, Secretary of Commerce, Before the American Marine Congress, New York City, Thursday, November 8, 1923.

It is simply a truism to say that we must have an American Merchant Overseas Marine. Entirely apart from the fine sentiment and national pride of a great trading nation in keeping its flag upon the seas, we must have our own ships for the protection of our foreign trade; we must have ships if we would expand our exports on sound lines and we must have them as an auxillary to our national defense.

It seems worth repeating at times that our international trade is one of the very foundations of our standards of living; that our whole fabric of living and comfort are dependent upon the import of commodities which we do not and cannot ourselves produce—tin, rubber, coffee, sugar, and a score of others; further, in the main the amount of these commodities we can import will depend upon the volume we export. Moreover we need a constant expansion of our export markets to give stability to our internal production by a wider range of customers.

If we are to have secure export markets we must have some sound proportion of American controlled shipping to assure us against combinations in rates which would prejudice our goods in competitive markets.

Nor have our merchants been without the experience of finding that the transport of our goods in foreign bottoms has been taken advantage of by our competitors to learn the details of our trade connections.

The facility of the world in creating combinations in restraint of trade has been growing by leaps and bounds since the war and while we, as a nation, endeavor to curb these activities within our borders, there has naturally been no curbing of these activities abroad when they affect American interests. Today there are many commodities upon which we are dependent by import from foreign lands in which there are combinations in control of price in those foreign lands. Combinations in control of sea rates are the commonest thing in the world shipping fabric. Many of our raw material exports, such as wheat, are sold in the world market in competition with those of other countries and the price level in these cases is the result of competitive streams that flow into these world markets. In wheat the farmer's return is fundamentally the price which he receives at Liverpool less the cost of transportation and handling. Therefore, any increase in shipping rates is in fact a deduction from the price to the farmer. It is just as important to him to be guaranteed reasonable rates of sea transport as of land freight. The real security is an American-owned Merchant Marine. In the long view the expansion of our foreign trade must and will take place in the export of larger proportions of manufactured goods. The primary requisite for such expansion is the assurance

of regularity in transportation. Not only do we need regularity of sailings week by week, in order that the manufacturer may be assured in his problems of delivery, but our merchants and manufacturers require to know that when they have established their goods in foreign lands then regular transportation will be assured to them over years to come. They cannot be dependent upon hazards of foreign ship owners, allied as these owners are with foreign merchants and competitors.

We must have especially regular and positive transportation under our flag on those great trade routes where our commerce can and will expand. Nor can America be dependent for her movement of overseas goods upon the make and break of peace and war in different parts of the world. We have had one gigantic national experience with this already. We must have ships under our own flag if we are to have security in our vital supplies and exports when other nations go to war with each other. As an auxiliary of our national defense we must have preparedness in transport for soldiers and supplies; we must have a training ground for our sailors, or our Navy itself would be helplessly confined to our own coasts.

In a broad sense the American people are endeavoring to establish a Merchant Marine that will adequately protect and promote our commerce. The ideal is regular, ferry like service of boats of the cargo liner type with some passenger capacity traversing the great trade routes of the world and carrying at least 50% of our foreign trade. Today, outside of oil, we are carrying

less than 20%. Some day we will attain such a merchant marine. Our national necessities, the capacity of our people for organization, for mechanical development and enterprise will some day bring it about. In the meantime we have much divided opinion in public mind, in the shipping world and in Congress, as to method. And our shipping world is suffering from great handicaps.

It is not my purpose to review all these handicaps that are so familiar to you but rather to present to you one single phase that has not been so generally considered that is capable of remedy. That is the relationship that American merchants abroad must bear to the success of an American Merchant Marine. *We will never have a real American Merchant Marine until we have a much larger complement of merchants of our own nationality conducting our commerce in foreign ports. Our raw materials are largely sold at our shores to foreign merchants.* They dictate the shipping. Again most of our purchases of raw materials are for delivery at our shores. The foreign merchant again controls the shipping. If we except oil, most of our manufactured goods for export are dealt with by foreign merchants. How real all this is, is shown by the fact that except oil only about 12% of our imports and exports were managed by American merchants abroad.

The situation is just as insecure for our exports as for our shipping. If we would make sure of the continuous flow of goods we must have the American

on the ground distributing to the foreign retailer, securing business by his services as well as his price. Many an American merchant has seen his established trade disappear because he depended upon a foreign merchant not to show patriotism to his own country. This situation has been contributed to by the tendency of some of our manufacturers to regard export as a happy hunting ground in times of domestic depression, to be abandoned in times of domestic demand. *We cannot have a Merchant Marine without an army of American merchants in foreign ports. This is the foundation of our British competitors.*

No stable consumption of goods can be built up on such a fabric. And other things being equal, the merchant ships his goods under his own flag, even giving a preference to that flag. Our competitors certainly do so. The lack of growth in our merchant personnel abroad is, I believe, to a large degree the fault of our Government for reasons I will detail later.

Despite our expanding export and import trade, the number of our merchants abroad has decreased in late years and yet if we would have a merchant marine they must be increased. The taxation policies of our Government have been to some degree responsible for this situation.

We are asking our merchants to expatriate themselves in order to sell American goods and manage American ships. Up to 1919 our own Government imposed upon them in income taxes the same percentage of their profits as upon our merchants resident at

home. They also paid taxes to the Government where they resided. We thus demanded that they pay double taxes. Some relief is afforded by the provision that the amount of taxes paid in the foreign countries may be deducted from the income tax which is payable to the United States, but this does not cover the entire problem. For instance, American merchants in the Latin-American countries, the Orient and some European states pay our very high income tax, while the amount deductible for taxes paid in those countries is very small. British merchants resident there pay no taxes to their home government, and thus the cost of our doing business through merchants of our own nationality willing to reside abroad in the cause of promotion of American commerce is greater than that of our competitors or of our doing business through foreigners.

It is, therefore, felt by many as more economic for Americans to stay at home and sell their goods in the Argentine through a German or a British merchant. Scores of our merchant firms, totally discouraged, have thrown up the sponge.

Before the war, there were at least 1,000 American engineers employed abroad at substantial salaries. These men went abroad to install American methods, American machinery and equipment in the production of raw materials, and in transportation. These salaried workers found themselves at the end of the war subject to two gigantic income taxes and thus their foreign mission was unprofitable. I doubt whether there are

100 of them left in foreign territories today. The relief given is only partial, as I have said above. A vast stream of American machinery and equipment that followed in their wake has dried up.

There is one phase of this matter of vital importance to our farmers. Over 80 per cent. of our agricultural exports go to Europe. Before the war European merchants bought stocks of wheat and grain during our fall marketing season and thus assisted in financing the crop. They carried stocks in European warehouses, thus relieving our congestion. Today, shortage of finance and credit leads them to buy from day to day and thrusts the burden of carrying the world's seasonal reserves either upon our own farmers or upon our merchants. If our merchant firms were established in Europe it would be possible for them to give delivery at that end and to establish short credits to their customers—all of which would relieve our farmers. But American merchants are not likely to establish in the lower tax countries in Europe and to pay high income taxes compared with our competitors.

Another case of pertinent order is that on the China Coast. Inasmuch as China has no dependable corporation law much Chinese capital is invested in foreign corporations under the management of, or in partnership with, Europeans. As foreign governments exact no home taxation from such corporations or their stockholders the Chinese naturally prefer them. We attempted to remedy this by Congressional authority to establish special American corporations under Federal

authority, but the restrictions are such that the Act has failed its purpose. Three large American managed businesses have gone over to control of our competitors at a real loss to our foreign trade and the great discouragement of our merchants. Similar questions are arising in the Philippines.

I wish to repeat that if we are to secure the establishment of a merchant marine we must secure dispersion of the American merchant and our Government today is one of the most destructive influences in the whole matter. I do not wish to argue the theory that Americans who are engaged abroad in reproductive work should not bear their share of the national burden. I would only point out that other nations have found it is uneconomic to impose this burden upon them, and that we are left in a prejudiced position. Nor am I pleading the cause of the American expatriot, who prefers foreign civilization as a luxury, who is bringing no returns to his country by way of his savings or by way of his expansion of American trade.

These two groups are quite distinct. They can be distinguished in tax measures so as to apply the relief only to incomes earned abroad. One is tied passionately to his country's interests and the expansion of its welfare; America to him is the home he serves in managing her trade. He will yet return with his savings to add to the national wealth, whereas the other is but a pensioner on our national resources. And yet as a nation we penalize the one who brings us service and credit. (The italics are ours.)